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DAY OF GENERAL DISCUSSION

“Everyone has the right to benefit from the protection of moral and material
interests which flow from all artistic, literary or scientific productions of
which he is the author” (art. 15, para. 1 (c), of the Covenant)

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Protection of cultural property: an individual and collective right

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1. This brief paper does not deal with intellectual property in the traditional sense, but with interference between the right to own property (unfortunately not included as such in the two Covenants) and the cultural rights which are provided for in article 15. Paragraph 1 (c) refers to a right which comes within both categories. As a property right, it is both individual and collective; as a cultural right, it is not only individual and collective, but is also a res communis. The protection of cultural property therefore relates not only to an individual right, but also to a public asset which it is vital to protect now that privatization is likely to cut off access by the poorest to cultural resources and to prevent individuals as well as groups from enjoying the freedoms which are necessary for creative activity. This right lies at the crossroads of very different ways of thinking and is the core of the democratic system. I will refer to it below in connection with the three terms which compose it as a legal relationship: its beneficiary, its object and its suppliers.¹

1. The beneficiary, alone or in association

2. The right to own property is a human right because it is inherent in the beneficiary. It is a matter not only of having, but also of existing or, more precisely, of having a basic minimum in order to exist; it is a prerequisite for the beneficiary's existence, dignity and identity. The right to own property is the indispensable underpinning of all freedoms because, where a minimum of resources is lacking, freedoms are merely academic. Article 15 first and foremost defines freedoms, together with the conditions that are necessary for them.

3. It is important to spell out the relationship between the right to own property and freedoms in order to show that this right occupies pride of place within the human rights system as a whole and within each "group of rights", particularly cultural rights. According to the traditional doctrine, the right to own property is a guarantee of an increase in powers and hence of a diversity of actors, both in market and in public forum terms. This right brings the individual and collective beneficiary's autonomy directly into play. Everyone, alone or in association, has the right to take part in the enjoyment of assets which are necessary to his autonomy and inherent in his dignity. The logical link between property and freedom was established by Locke. In the "Second Treatise of Civil Government", the philosopher justified property by the fact that man mixed his labour with nature and joined to it something that was his own and thereby made it his property. Property is therefore a conquest and a guarantee of freedom to work, an indivisibly social, cultural and civil right, the foundation of the democratic system. More precisely, the term *property*, denoting life, liberty and fortune, means that man's essence, which we now define by his culture, is an indivisible combination of a given (nature) and of labour added to it (Fuchs, 1994, 111). This right can be found at the very root of the beneficiary's nature. *The right to own property, which the beneficiary exercises alone or in association, is the right to preserve for himself the space necessary to his identity. To be a property owner is to have the freedom to pause a little to take a look at others and things.*

4. The difficulty with the right to own property - and what makes it interesting - is that, since it cuts across all the usual categories of human rights, it provides a particularly clear explanation of the existential connection between the beneficiary of the right and the network of relationships without which it is unintelligible, including the material dimensions that this linkage implies. The dignity of the beneficiary is therefore *linked* to the enjoyment of assets, whether they are things, a territory or a capacity for trade. These assets *link* the beneficiary not

only to things, but also to the others with whom he partly shares such enjoyment. The right to own property therefore leads us to think of the beneficiary not as an isolated individual, but as an individual who fits into his environment: the capacity to appropriate things and to identify with a heritage and with a social group is a fundamental cultural freedom. The lack of recognition of this right as such in the Covenants can probably be explained not only by the ideological cold war divide, but also by the inevitable doctrinal question: what is the nature of the beneficiary of human rights? In what way is he linked to his environment? *We are still dealing with the individual, but with the capacity to appropriate things.* Property cannot be regarded exclusively as a safeguard of the individuality of the beneficiary in relation to his different needs; it also includes work tools and the common property of a family, or an enterprise, as well as public property. This is why article 17, paragraph 1, of the Universal Declaration states that: "Everyone has the right to own property alone as well as in association with others". The words "as well as" are significant. They relate not only to the collective exercise of an individual right, but also to the capacity of the beneficiary of the right freely to form, and to be recognized as a member of, a group. The beneficiary's capacity for appropriation is particularly significant for cultural rights as a whole, since it denotes his freedom to recognize his identity as being linked to a heritage, a community and an occupational culture.²

5. Man takes part of his identity from what he has appropriated:³ a farmer cannot be explained without his field or a nomad without his herd, but they can also not be defined only in terms of their possessions. The right to privacy, to freedom, to a work tool and to the fruit of one's labour - everything that relates to identity and property is private. The culture of a human being, like that of a group, is like a layer of skin. It is superficial and identifying, weak and strong, with a very intimate surface reactivity; it gives the appearance of being inside out; it enables the beneficiary to become the object, to be placed dangerously at the disposal of others, freely to create bonds of social membership.

6. "Cultural property" thus means more than "intellectual property" because account must be taken not only of what is produced by an artist, a scientist or a writer, but also of what is produced by a cultural community,⁴ by the custodians of a heritage or by a people. Each creative activity is based on a common cultural capital - and this explains why individual creativity and collective property must be protected *at the same time*. This means establishing a close link between article 15, paragraph 1 (b) and (c), as two aspects of the protection of the right to take part in cultural life.⁵

7. Copyright is not to be understood here as being restricted to artistic, scientific or literary creativity; craftsmen also have a copyright on their work, just as a community or a people as a whole has a copyright on its cultural identity. Ownership of one's territory, dwelling, work tools and the fruits of one's labour is a means of guaranteeing equitable *cultural autonomy* and establishing a border or demarcation line with regard to a uniform market that cannot produce anything but standardized articles. With its economic dimension, copyright protects the freedoms necessary for creativity. In the case of a large community, the economic dimension means having the resources required for cultural autonomy. It is important to note that the protection of the right to cultural property guarantees both economic freedoms and cultural freedoms, which are elements of a market logic which fits into a public forum. *The right to cultural property guarantees that the holder is both author and actor in terms*

of rights/freedoms/responsibilities, in the case of an individual; or, that rights/freedoms/responsibilities are exercised jointly by individuals who identify themselves as members, in the case of a group.

8. A distinction therefore has to be made between the two characteristics of the holder of this right:

The subject, i.e. the author and actor of the right and of that of others, is *always an individual*; respect for his human rights always takes precedence over respect for the human rights of any group;

The beneficiary, who receives the advantages guaranteed by the right in question, may be an individual or a group (measures of protection may be intended for an individual, a minority group, a cultural community, a people).

This distinction is important in order to avoid confusion between individual and collective rights holders: the subject is always individual, but the beneficiary may be collective. However, the purpose of the right cannot be confined to measures of protection which affect the beneficiary: the issue is one of empowerment and of recognition of the author's entitlement as actor, whether individual (subject) or collective (social actor). The protection of the moral and material interests of a common heritage (as in the case of traditional knowledge of medicinal plants) affects the members of this group as authors and actors of a cultural asset which they share, as well as their political freedom to form a group. The right to own property allows the individual to move or be delegated towards the freely recognized group. Protecting the heritage of a group means guaranteeing a resource which is indispensable to the identification and activity of individuals who identify themselves within it and of the social actors of which they freely form part. It is also a way of protecting an asset that can be useful to a large number of people.

9. There are thus two holders (whether subjects or beneficiaries, individuals or groups): the author and the user. The right to cultural property not only strikes a balance between two *interests*, as in the case of an ordinary right, but, since it is a human right, it ensures that it is within everyone's grasp, as a resource necessary for everyone's activity and sense of identity. Just as property is an interface between the individual and the group, it is also a link between the author and the user. It is all the more important to explain this link in that the distinction is still not very clear-cut.

10. In a society where protected works are becoming increasingly complex and may be interactive as well (a book, but also a scientific theory, a traditional piece of knowledge, a Web page, a computer software program, an on-line newspaper on the Internet), it is becoming more and more difficult to differentiate between the author's activity and that of the holders of "neighbouring rights" and, in particular, between the whole body of knowledge which belongs in the public domain and between the different actors involved in research (sources/design/production/distribution). *A work is part of mankind's living memory*: it is not the individual who must be protected at any cost, but the "memory", the testimony to creativity, communication and use. The protection of individuals is relative to that which their other rights requires (particularly the right to work) and to the rights enjoyed by the users of a work. This

interactivity between authors makes the distinction - which was the basis for the right to intellectual property - between the presentation of a work and its content harder to draw. Only the presentation of the work was protected by copyright, not the content, which belongs to everyone (Vivant, 2000). Nowadays, presentation is usually interactive. It is difficult to tell the difference between the private part and the public part of a work.

2. The appropriated object, private and collective

11. The cultural specificity of the right to own property is thus twofold:

That of the author's copyright on a work; and

That of a beneficiary's copyright on a joint work.

The object of the right is not a thing (material or non-material), *but the appropriation by the beneficiary of this thing, linking him to others*. The two aspects of this link can be expressed by the term "moral and material interests".

The material means which guarantee the material autonomy of freedom: wages and use of means of production, communication and distribution;

The non-material means which guarantee the cultural autonomy of freedom and creative activity: authority over the interpretation and use of the work.

12. The right to cultural property recognizes a *close link* between the beneficiary of human rights and the objects which the subject freely appropriates: works, heritages, traditions, communities. The aim is not to confine the beneficiary within these memberships, but to guarantee the right to claim them, subject to respect for all other human rights. An object is therefore not only an individual work, but also one which is shared; it is all the more valuable in that it establishes a link between generations and between cultures.

13. The individual and collective dimensions of the beneficiary correspond to the individual and shared dimensions of the object. The individual and collective nature of property must therefore be safeguarded with the same determination because both are indispensable to freedoms. Collective property must be protected against privatization, just as private property must be safeguarded against abusive collectivization. While respect for private property guarantees the freedom of individuals and the interactive wealth of cultural and economic systems, respect for collective property make it possible to guarantee that it remains "free", for, otherwise, individual freedoms have no common resource.⁶ Excessive privatization diminishes the capital of creativity to which each individual should have access. In a more general way, *the object of the right, property, is always a bridge between persons and each right involves managing the relationship between what is private and what is collective*. The issue is one of adjustment, of the right balance between property and its holder, whether private or collective. One decision-making criterion is knowing who the beneficiary should be and who can assume the responsibilities relating to such property.

14. The object, i.e. property, can itself be understood on many levels. Roman law distinguished between *usus* (the right to use property), *fructus* (the right to receive income from property) and *abusus* (the right to dispose of property by transforming it, transferring it, or even destroying it). Property is never absolute (in the sense of non-relative) because it cannot be materially, socially or economically isolated. But if distinctions between *usus*, *fructus* and *abusus* are essential to indicate differences in the nature of property, they also indicate a degree of difference, showing that the concept of property is, in the proper sense of the term, analogical. In relation to democratic society, *abusus* is more directly liable to be restricted; in relation to human rights, *usus*, the right to use property, is the substance of the right, its intangible core when the use of the asset is inherent in the dignity of the beneficiary. Whatever the differences between economic and political systems, there is a basic feature, one which guarantees the personal or community use which is necessary to the autonomy of the actors, authors and users alike. The fact that property is not absolute in form does not mean that it is not a fundamental value.

15. The right to own property does, however, raise one very important question: it is a right to inequality and, while this is true of all freedoms – a fact which is not stated often enough – in this case, it is absolutely crystal clear. The idea of property is thus fundamentally asymmetrical; it separates the haves from the have-nots. We have to stop taking the easy egalitarian approach, which sometimes makes declarations about human rights look vaguely moralistic, and start dealing with the problem of protecting “inequalities which are useful to everyone” (Rawls). Property is not an abusive privilege when the owner uses it for others as he does for himself. In the case of cultural property, this principle is easier to apply because cultural assets can be shared more easily. The protection of this right is nevertheless the basic condition for the safeguard and development of the cultural wealth of our societies, as well as that of every individual. The question of equality that is referred to in a democracy is equality of dignity, not equality of achievement. *Being an owner is mainly being the owner of a difference,*⁷ the right of exclusion can – by means of this comprehensive monitoring – be understood as an inequality which is useful for everyone, an inequality which brings about a global increase in human resources. As ethical democratic standards, moreover, human rights require that there should not be two classes, that of owners and that of non-owners, but that each person should be able to enjoy differences and that multiplied and coordinated property should be a key component of the multiplication of the coordinated powers that go to make up a democratic culture.

All are suppliers

16. The right to own property lies at the heart of the process of ongoing democratization, since it signifies respect for the property/responsibility link. It means recognizing that anyone who claims to own property has a responsibility. This holds true for everyone, from companies and all their owners to citizen’s associations which claim collective ownership of property, such as a coastline, a green or urban space, and even for cultural associations which are responsible for intellectual property. Although it is true that respect for the right to own property is essential to the functioning of democracy because it increases decision-making and control centres, its realization also has to be ensured: the right to own property is democratic only insofar as it is defined in all useful ways.

17. Being an owner means being accountable to other users of this property and to those who are linked to it. The suppliers are therefore first and foremost owners themselves because property is legitimate only on one condition: that the owners' responsibilities are defined. Property is thus never isolated. It is an asset in the market economy, ensuring an economy of powers which are more or less controlled by a system of democratic rules; a number of obligations, explicit or not, are linked to it: no property is free of encumbrance. The right to own property must be interpreted in a deeply economic manner; it is encumbered by permanent charges owed to others. This is even more true in the case of cultural property: the poor suffer most from a want of knowledge-sharing and a lack of access to the resources necessary for their empowerment as actors and authors of their own rights.

18. This means that a democratic limitation on the right to own property is set by the ongoing existence of poverty. We are not simply referring to marginal poverty because, in that case, it would be enough to bring a humanitarian remedy. *It is the loss of human capital and capacities (Sen) which sets the boundary for the legitimacy of the right to own property* when failure to respect this right is prejudicial to human resources and their development and use.

19. The obligations of the State are thus basically obligations to guarantee rules of the game which allow the implementation of this right by all actors. The principle of *democratic regulation* is to replace all arbitrary limits on the right to own property by comprehensively establishing multiple interactive monitoring to guarantee the meaning, security, growth and consistency of the private/public relationship. States can therefore no longer use the "within the limits of available resources" excuse because their main obligations are to free up cultural actors and guarantee their rights to act on their own to implement all the cultural rights embedded in other human rights.

20. In internal law, this means protecting the material and moral interests of *cultural actors* (artistic, scientific, craft, literary and religious associations and associations for the protection of the cultural identity of groups which are discriminated against) so that they can enjoy the autonomy and the authority to which they are entitled in a democratic society, in the service of their members and of society as a whole. The objective is no longer a split between public and private actors, but a real transition to autonomy for all civil and private cultural actors through interaction with public actors.

21. At the international level, the protection of this right means a dialogue between all public, civil and private actors to safeguard the moral and material interests of the poorest population sectors, not only through appropriate measures in the field of patents and intellectual property, but also through a clarification of the different components of a cultural heritage and the obligations which it entails for every individual and for every authority, regardless of borders. The main objective is to define what forms part of the intangible core of the cultural heritage of every individual and community and without respect for which the other cultural rights cannot be implemented (for example, language rights, the right to work and all freedoms). Tampering with cultural property means tampering with the universal element which is present in every person, every culture, and every work. The challenge is to identify this requirement of universality in human beings and the things of daily life, i.e. *the essence of every woman and every man, even in their freedom to form a community.*

22. Instead of giving a list of obligations imposed on States, it is appropriate to clarify the obligation of defining complex "cultural policies" which promote interaction between all cultural actors by guaranteeing the rules of the game and, in particular, forums for debate so that the problem of striking the right balance between the interests of individual and collective holders of this right may be managed on a daily basis. The right to cultural property shows that there is a dividing line between that which is marketable and that which is not: no rule can a priori define the limits, apart from the need to protect all human rights. The first obligation is to establish clear rules for the continuing debate between all the actors concerned, with full representation for the most deprived.

Notes

¹ See in this connection: P. Meyer-Bisch, *The right to education in the context of cultural rights*, 1998, E/C.12/1998/17.

² This is why the "Fribourg Group" has adopted the wording of article 17 to refer to the beneficiary of every cultural right: "Everyone, alone or in association". See "Cultural rights. Draft declaration", Meyer-Bisch (Dir.Pub.), 1998, Paris, UNESCO, Fribourg, éd. Universitaires. The English and Spanish translations are available on our Web site: www.unifr.ch/iiedh.

³ Not only what he has appropriated for himself, but what he has appropriated: collective property which he has used to feed himself and which he has made a part of his identity.

⁴ The idea of "cultural community" is not to be understood primarily in the ethnological sense; it applies to any community based on culture, such as a scientific community. See article 1 (c) and article 4 (freedom to identify with a cultural community) of the above-mentioned draft declaration.

⁵ In the above-mentioned draft declaration, article 5, paragraph 3, on participation in cultural life, states: "It also entails the right to the protection of material and non-material interests derived from works which are the product of one's cultural activity". See commentary on this article, op. cit., para. 45, p. 37.

⁶ In the field of science, this is the problem of "open science". Without this principle, there is no scientific community and no scientific creativity.

⁷ All cultural rights protect differences, but this is not the same thing as saying that they are "rights to be different" because being different is not a value in itself. What counts is the interaction between differences (interactive diversity), i.e. wealth.

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